

STATE OF MICHIGAN  
IN THE SUPREME COURT

MICHIGAN TOOLING ASSOCIATION WORKERS'  
COMPENSATION FUND, in its own right and as  
Subrogee of DISTEL TOOL & MACHINE CO.,

Supreme Court No. 127834

Plaintiff-Appellee,

Court of Appeals No. 249013

vs.

Oakland Circuit No. 01-030684-CK  
Hon. Colleen A. O'Brien

FARMINGTON INSURANCE AGENCY, L.L.C., a  
Michigan limited liability corporation,

Defendant-Appellant,

and

MACHINERY MAINTENANCE SPECIALISTS, INC.,  
a Michigan corporation,

Defendant,

and

FARMINGTON INSURANCE AGENCY, L.L.C.,

Third-Party Plaintiff-Appellant,

vs.

EMPLOYERS INSURANCE OF WAUSAU and  
WAUSAU INSURANCE COMPANIES,

Third-Party Defendants-Appellees.

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**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO  
APPLICATION FOR LEAVE TO APPEAL**

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## **STATEMENT OF FACTS**

### **INTRODUCTION**

This supplemental brief is filed in response to the Court's order of October 7, 2005. In that order, the Court indicated that the matter would be scheduled for argument on the application, and the Court asked the parties to address "whether Farmington Insurance Agency owed a duty to Distel in relation to the certificate of insurance, where Farmington Insurance Agency did not send the certificate of insurance to Distel and otherwise had no contact with Distel." The Court further allowed supplemental briefs, and instructed the parties not to merely restate arguments already submitted.

The Court's inquiry indicates that the Court may be operating under the mistaken belief that there was no contact between Distel and Farmington Insurance Agency. In fact, there was contact. These supplemental facts are intended to clarify the contact and relationship between the two parties.

### **FACTUAL BACKGROUND**

As the court may recall, this matter was tried over a four-day period. Thus, there is a factual record to guide the Court in deciding this case.

In its Complaint, plaintiff alleged that "During that period from January 29, 1998 to April 1, 1998, MMS asked FIA to issue certain Certificates of Insurance to MMS customers, *including Distel*, in order to confirm to those customers that MMS carried required workers' compensation insurance" (Complaint, ¶ 10, emphasis added; the applicable page is attached as Appendix A to this brief). The specific certificate of insurance was attached to the Complaint. Defendant Farmington Insurance Agency ("FIA") reviewed the Complaint and admitted the

allegation that it had sent a certificate of insurance to Distel (Answer to Complaint, ¶ 10; the applicable page is attached as Appendix B).

FIA filed a third-party complaint against Wausau Insurance. In that third-party complaint, FIA specifically alleged that “a Certificate of Insurance was issued by FIA for the benefit of MMS and for the benefit of Distel on or about March 6, 1998. On or about that same date, FIA faxed and/or mailed the Certificate of Insurance issued to MMS and Distel to Wausau.” (Third-Party Complaint, ¶ 11, see Appendix C).

On the final day of trial (late afternoon), FIA moved to withdraw the judicial admission in its answer to the complaint (Tr 8/28/02 p 80). The circuit court permitted withdrawal, stating “I don’t think it makes any difference or prejudices anyone” (*id.* p 88). Plaintiff brought a cross appeal from that decision (see Plaintiff-Appellee/Cross-Appellant’s Brief on Appeal, Issue III, pp 18-20, attached as Appendix D to this brief). The Court of Appeals found it unnecessary to reach this issue, based on the decision it reached:

Finally, Michigan Tooling argues that the trial court should not have allowed Farmington to modify its pleadings, pursuant to MCR 2.118(C)(2). However, we need not reach this issue because any error with regard to the amendment is immaterial in light of our resolution of the issues raised by Farmington on appeal. [Slip Op. p 5.]

Two key trial exhibits are also relevant to the supplemental issue raised by the Court. Plaintiff’s exhibit D (attached as Appendix E to this brief) is a color photocopy of the certificate of insurance as found in FIA’s file. Mr. Primak of Machinery Maintenance Specialist, Inc. (“MMS”) requested that a copy of the certificate be sent to David Freedman, Inc. Rebecca Steingold at FIA sent a fax copy of the certificate to Freedman. After she sent the fax, she marked in blue ink “#171” and in red ink “success” to indicate that she had successfully faxed the document, and that it was transaction #171 (Tr 4/8/02 pp 11-12).

Trial exhibit G (attached as Appendix F to this brief) is a copy of the certificate of insurance as found in Distel's files. It includes the notations "#171" and "success," which verifies that Distel's copy came from FIA's files. Plaintiff has taken the position in the circuit court, the Court of Appeals and this Court that FIA sent a copy of the certificate of insurance to Distel *just as FIA said it did*. This indisputable trial proof was determined by the trial court and the Court of Appeals to be immaterial since judgment was entered and affirmed for other reasons.

### **SUPPLEMENTAL ARGUMENT**

#### **I. THE COURT OF APPEALS AND CIRCUIT COURT DID NOT ERR BY FINDING THAT FARMINGTON INSURANCE AGENCY OWED A DUTY**

Appellant has stated the issue on appeal as whether Michigan law should recognize "a duty of reasonable care with respect to the supplying of insurance information by the insured to unknown and unforeseeable users of that information." That may be how *appellant* would like to view the issue, but that is not a factually accurate recitation based on the evidence submitted at trial. Appellee is genuinely concerned that appellant's skewing of the facts via its statement of the issue has misled the Court into believing the facts are exactly as appellant has stated them.<sup>1</sup>

##### **A. Contact Between FIA & Distel**

There are several reasons why the judgments of the circuit court and the Court of Appeals should be affirmed. First, as noted in the Introduction, there was contact between Farmington Insurance Agency and Distel Tool. The Complaint alleged that Machinery Maintenance

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<sup>1</sup> Appellee acknowledges that the Court of Appeals may have operated under the same misapprehension ("Farmington apparently did not deal with Distel and was not aware Distel existed until after the injury," Slip Op. p 3). The Court of Appeals, however, found it unnecessary to base its decision on these facts. Even if this Court were to reverse, it would be appropriate to remand for reconsideration on the whole factual record.

Specialist asked FIA to issue certificates of insurance to various customers, including Distel (Complaint, ¶ 10). This allegation was admitted in the answer to the complaint (Defendant's Answer, ¶ 10, "admits same"). On the final day of trial, appellant moved to delete the admission. The circuit court, believing it did not make a difference to the case, allowed the admission to be withdrawn (Tr 8/28/02 p 88).

As a result of the admission – and the circuit court's conclusion that it was immaterial to the decision it was about to render – plaintiff did not focus its trial proofs on this specific issue. Nonetheless, plaintiff's trial exhibit D, which is reproduced in color as Appendix E to this brief, shows that an employee of Farmington Insurance Agency wrote "success" *in red ink* (testimony of Rebecca Steingold, Tr 4/8/02 p 11) after successfully faxing the certificate to Freedman. That notation, however, also appears (in black and white) on the copy Distel received (trial exhibit G, Appendix F to this brief) – showing that it received a copy from FIA's file after FIA had already sent a copy to Freedman. The only way for "#171" and "success" to appear on Distel's copy was for Distel's copy to have come from FIA's file. Indeed, it could have come from nowhere else. Neither Freedman's nor MMS's copy could have had those handwritten notations included since they were only added *after* the fax was sent.

The circuit court also found a relationship between the parties by virtue of the Workers' Compensation Act:

Moreover, the Court finds there was, in fact, a relationship between the parties, although not a direct one. Their relationship exists through the Michigan Worker's Compensation Act. Plaintiff was considered a statutory employer for purposes of the Act, and Defendant FIA was an agency providing insurance to employers through the Worker's Compensation Placement Facility. *Plaintiffs were in a class of parties who could reasonably rely on Certificates of Insurance issued through agencies such as FIA.* As a direct result of Defendant's actions, Plaintiff suffered damages for which it would not have otherwise been responsible. [Opinion & Order, p 10 (emphasis added).]

The finding that plaintiff was in a class that could rely on the representations was a finding of fact. Accordingly, the “clear error” standard of review applies. *Bynum v ESAB Group, Inc*, 467 Mich 280, 285 (2002). Defendant has not challenged this finding, let alone shown that it is clearly erroneous.

The Court of Appeals adopted the trial court’s rationale. Slip Op., pp 2-3. This rationale is particularly strong because, in issuing the certificate, FIA breached a specific statute (then-MCL 500.1201) for which it could have been subject to extensive fines, loss of license, and imposition of injunctive relief. MCL 500.1244.

This Court can confidently affirm the Court of Appeals’ unpublished opinion on the basis of the specific facts of the case.<sup>2</sup>

**B. Foreseeability**

Second, the nature of a certificate of insurance in the commercial world is greater than appellant acknowledges. Appellant argues that it is “unforeseeable” that a certificate of insurance would be shared with other parties. In fact, it is industry practice to do exactly that. Expert witness Lawrence Polec testified during cross-examination:

A. This certificate of insurance is relied on by clients and customers. So, to answer your question it’s, it’s reasonable to think that somebody would rely on this certificate of insurance, even though the [named] certificate holder is different. [Tr 4/8/02 p 171.]

Questioning continued:

Q. That’s who the representation is being made to, the certificate holder?

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<sup>2</sup> Because FIA issued a certificate identifying another contractor, David Freedman, Inc., at the time that Distel sought confirmation of MMS’s insured status, is there any doubt that if MMS had requested a second certificate from FIA specifically naming Distel, FIA would have issued it just as they had done to Freedman?

A. It can be construed and relied upon by somebody like myself reading this certificate that insurance is in effect as of 3/6/98 for Machinery Maintenance Specialists, regardless of who the certificate holder is.

Q. Would you rely upon a certificate of insurance not addressed to you?

A. If somebody were to have shown me this certificate of insurance okay to prove that coverage was in effect on 3/6/98 and my name was not David Friedman [sic], yes I would believe that insurance coverage would be in effect. [*Id.* p 172.]

Mr. Polec, who supported Wausau Insurance and Distel in his testimony, also confirmed that certificates of insurance are sometimes issued with a blank certificate holder for the customer's use in demonstrating that insurance was in effect (*id.* pp 218-219). When issued in blank, the certificate is called a "proof of insurance," and it demonstrates that insurance is in effect without regard to any certificate holder *Id.* p 220.

In opposition to this testimony, appellant has presented no evidence to support its view that transmission of the certificate of insurance is unforeseeable. Appellant ignores not only the specific facts of this case, but the nature of a certificate of insurance. By analogy, consider the certificate of insurance we each carry as licensed drivers of automobiles. That certificate is issued to the insured, but it is shared with the Secretary of State at license renewal time, police officers at the time of a traffic offense, and other drivers at the scene of an accident. Others rely on that certificate to accurately reflect the existence of insurance. For the past thirty-two years the law of the State of Michigan has been that a negligently issued certificate of insurance creates monetary liability in the agent who issued it. *Kaminskas v Litnianski*, 51 Mich App 40 (1973). In an automobile setting, this everyday slip of paper we all carry in our wallets is shared with others. It is mind-boggling that an agency insuring companies would claim that it did not know that certificates of insurance in that industry are shared as openly as automobile certificates of insurance. This is particularly important where, as here, the absence of insurance forced appellee Distel Tool to bear the costs of an injury to a non-employee on the sole basis that the injured

worker's employer wrongly believed that it was insured, when in fact it was not insured, due to an admitted error committed at the agency office. Thus, this is not a situation where Distel has performed a wrongful act and must bear the consequences. Instead, through no fault of Distel, it accepted the representation of Farmington Insurance Agency that its insured was really insured. Appellant may argue that social policy should dictate whether a duty applies, but the fact of the matter is that social policy supports imposing liability on a wrongdoer rather than an innocent bystander.<sup>3</sup> The circuit court specifically found that "FIA bears liability in this matter since they are the party that disregarded the rules of the Worker's Compensation Placement Facility." Opinion & Order, pp 10-11. The circuit court concluded that public policy would be served if insurance agencies followed Placement Facility rules by confirming that insurance actually exists before issuing certificates attesting to that fact. *Id.* p 11.

Thus, even if the Court disregards the specific factual proofs, industry practice in the field as well as workers' compensation law would still support the Court of Appeals' judgment. The Court of Appeals was aware of this background, as the presiding judge had substantial private practice experience in construction litigation, a field where certificates of insurance are also commonly circulated.

C. Agent Bears Liability for Misrepresentation on Principal's Behalf

Third, Farmington Insurance Agency acted as an agent of the insured. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 109-110 (1998); *Harwood v Auto-Owners Ins Co*,

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<sup>3</sup> As noted in the circuit court's opinion, "As a direct result of FIA's actions in issuing the inaccurate Certificate of Insurance, Distel allowed the MMS employee to enter their property and then sustain damages as a result of the employee's injury. When Staten was injured, Plaintiff became responsible to pay his Worker's Compensation bills and attorney fees defending the matter." Opinion & Order, p 11.

211 Mich App 249, 254 (1995). An agent who commits misrepresentation bears liability. 3 Am Jur 2d *Agency*, § 298, p 669; 37 Am Jur 2d *Fraud & Deceit*, § 315, p 327.

**D. Appellant's Supplemental Authority**

Appellant has submitted as its supplemental brief a short recitation of three foreign cases and one Michigan appellate case. None support the position appellant has taken in this appeal.

Appellant cited *Downs v Saperstein Assoc Corp*, 265 Mich App 696, 701 (2005), for the proposition that a duty is not owed to third parties unless a special relationship is established “whereby a third-party has entrusted himself to the protection and control of the defendant.” That case has nothing to do with insurance liability or misrepresentation. Instead, in *Downs* the Court of Appeals rejected the plaintiffs’ contention that the fire department’s city charter authorization to “protect life and property” did not create a duty to protect individuals from fire.

Appellant cites two New York cases in support of its contention that there is no duty flowing from an insurance agent to a non-customer regarding the issuance of certificates of insurance. Both cases deal with “additional insureds” under policies, and they do not involve an interplay with workers’ compensation law as is involved in our case. In *Greater New York Mutual Ins Co v White Knight Restoration, Ltd*, 7 AD3d 292; 776 NYS2d 257 (2004), New York’s intermediate appellate court ruled that a broker was not liable to a general contractor who had been erroneously named as an additional insured on a policy. In a short memorandum-type opinion<sup>4</sup> that fails to disclose the key language, the court held that disclaimer language in the document precluded the general contractor from claiming it had reasonably relied on the representation. The court also rejected the claim because there was no privity between the

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<sup>4</sup> Based on the short length and the utter lack of detail, these New York opinions would likely be unpublished memorandum decisions if issued by Michigan’s intermediate appellate court. It is doubtful this Court would find such authority binding or persuasive.

general contractor and the insurance broker. The court did not discuss the specific disclaimer language, and appellant has not tied that analysis in any way to the documentation in this case.

Similarly, appellant relies on *Benjamin Shapiro Realty Co v Kemper National Ins Cos*, 303 AD2d 245; 756 NYS2d 45 (2003). There, the intermediate appellate court (in another memorandum-style opinion) determined that an additional insured did not have rental coverage where the certificate apparently mentioned that coverage, but the policy itself did not provide it.

Appellant also relies on an Arizona case, *Napier v Bertram*, 191 Ariz 238; 954 P2d 1389 (1998), for the proposition that an insurance agent does not owe a duty to non-clients, absent a special relationship. The facts of *Napier* are entirely different from our case. In *Napier*, a taxicab operator purchased insurance. The cab was involved in an accident, and plaintiff – a paying passenger – was injured. It was determined that insurance had not actually been provided – it appeared the named insurance company was insolvent, not licensed, or entirely fictitious. 954 P2d at 1390. The passenger sued the insurance agency for negligently failing to procure insurance on the cab company’s behalf. The Supreme Court ruled that “a professional owes no duty to a non-client unless special circumstances require otherwise.” *Id.* at 1393. Analyzing cases that had found such a special circumstance, the Court noted a thread between all of them: there was a “foreseeable risk of harm to a foreseeable non-client whose protection depended on the actor’s conduct.” *Id.* The Court noted that several states<sup>5</sup> had found liability for injuries to non-clients, but the Court declined for public policy reasons to extend that rule to Arizona because “we believe that recognizing such a duty would prove too disruptive to the established expectations of the insurance industry.” *Id.* pp 1394-1395. Here, however, the established

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<sup>5</sup> The Court did not notice that Michigan is among those states that have recognized such liability (in *Kaminskas*).

expectations of the industry – based on *Kaminskas* – would support the continuation of liability. In addition, ours is a case where the two insurers (Wausau and Michigan Tooling as subrogee under its pool) have a dispute with an agent who has breached the scope of its authority under its relationship with Wausau and the rules of the Workers Compensation Placement Facility. If the “established expectations” of the insurance industry are to be considered, those expectations are best represented by appellee’s position, not appellant’s.

Moreover, the *Napier* Court’s decision was based on foreseeability. In the case at bar, the expert witness testified about the foreseeability of reliance by others in the industry. That testimony assisted the circuit court in making its factual finding that plaintiff was within the class that would reasonably rely on the certificate of insurance (a finding that has not been challenged nor shown to be clearly erroneous as stated earlier).

**E. Relief**

Even if this Court were to determine that direct contact between the parties is required to support the negligence claim, remand would be necessary to consider the cross appeal.

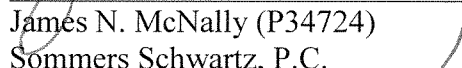
Distel filed a cross appeal from the circuit court’s order permitting defendant to withdraw its admission on the last day of trial (see argument from Court of Appeals brief, Appendix D). The circuit court ruled that there would be no prejudice to Distel because the court was about to render a decision that did not depend on whether direct contact had or had not existed. Both the circuit court and the Court of Appeals found it unnecessary to address the admissions made by FIA because the topic was irrelevant or immaterial to the decision. If this Court determines it is material or relevant, the cross appeal needs to be addressed. If this Court rules that those facts are material to the inquiry, Distel should have an opportunity to pursue this argument anew.

PRAYER FOR RELIEF

Appellee continues to urge that this Honorable Court deny the application for leave to appeal from the Court of Appeals' unpublished opinion. If this Court is inclined to grant any relief to appellant, however, appellee also prays that this Court remand the matter to the Court of Appeals for plenary consideration of those issues the Court of Appeals deemed unnecessary to its decision.

Respectfully submitted,

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